COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, APRIL 2, 1999

PETITION OF

GLOBAL NAPs SOUTH, INC. CASE NO. PUC980173

For arbitration of unresolved issues
from interconnection negotiations with
Bell Atlantic-Virginia, Inc. pursuant to
§ 252 of the Telecommunications Act of 1996

FINAL ORDER

On November 16, 1998, Global NAPs South, Inc. ("GNAPs") filed a petition for arbitration of unresolved issues from interconnection negotiations with Bell Atlantic-Virginia, Inc. ("BA-VA") under § 252(b) of the Telecommunications Act of 1996 ("the Act"), 47 U.S.C. § 252(b).

On November 24, 1998, we entered a Preliminary Order, docketing this matter and ordering BA-VA to file a response to the GNAPs petition, and ordering that comments from interested parties be filed on or before December 30, 1998.

On November 25, 1998, GNAPs filed a motion for a hearing to consider its request that BA-VA provide GNAPs interconnection on an interim basis and for expedited treatment of its petition.

On December 11, 1998, BA-VA filed its response to the GNAPs arbitration petition and motion. On December 30, 1998, GNAPs filed its reply to the response of BA-VA.

By order of January 29, 1999, we determined that there was no need to hold an evidentiary hearing in this proceeding, having found that the issues raised by the parties presented only legal questions; that there were no issues of fact in dispute; and that both parties had waived their requests for a hearing.[1] The order also provided for the parties to supplement their pleadings filed herein to define or further clarify their positions on the issues raised, and to address how (or if) the United States Supreme Court's recent decision in AT&T Corp. v. Iowa Utilities Board, ___ U.S. ___, No. 97-826 (Jan. 25 1999), affects the issues before us.

The parties filed their supplemental briefs on February 10, 1999.

BA-VA contends that the Supreme Court's reinstitution of the Federal Communications Commission's ("FCC") "pick and choose" rule, 47 CFR § 51.809 ("FCC Rule 51.809"), results in GNAPs not being entitled to adopt BA-VA's 1996 interconnection agreement with MFS Intelenet ("MFS Agreement"). BA-VA offers three bases for its position. First, it states that FCC Rule 51.809(c) requires that it make available to GNAPs terms and conditions of existing interconnection agreements for only a "reasonable period of time," and that such time has expired with respect to the 1996 MFS Agreement. BA-VA next asserts that subsection (b)(1) of FCC

[1] We also denied GNAPs motion for interconnection on an interim basis.

Rule 51.809 relieves it from offering to GNAPs the reciprocal compensation rates of the MFS Agreement because BA-VA will incur greater costs in providing interconnection to GNAPs than to MFS due to the expected imbalance in traffic delivered by BA-VA to GNAPs versus traffic delivered by GNAPs to BA-VA. Third, BA-VA asserts that, even if it is required to offer GNAPs the terms of the MFS Agreement, GNAPs must be bound by the July 1, 1999, termination date of that agreement because it is a provision "legitimately related to" the pricing terms of the MFS Agreement.[2]

GNAPs' brief in response to our January 29, 1999, order reiterates its arguments made in prior pleadings that it is entitled to reciprocal compensation for terminating traffic to Internet Service Providers ("ISPs"); and that it should be able to opt-in to the MFS Agreement for a full three-year term. GNAPs asserts that BA-VA acted in bad faith by not permitting it to opt-in to the MFS Agreement in August 1998.

GNAPs also comments on the Iowa Utilities Board decision and the reinstated FCC Rule 51.809. GNAPs states that the requirement of 51.809(c) that interconnection agreements be made available for only a "reasonable period of time" addresses concerns of technical incompatibility so as to prevent forcing an incumbent from conforming interconnection arrangements to outdated technical

[2] See FCC's First Report and Order, ¶ 1315, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, 16139.

models. Such technical considerations have no relevance in this case according to GNAPs.

GNAPs responds to Rule 51.809(b)(1) by explaining that the "greater cost" exception to the opt-in requirement does not protect incumbents from the volume of usage that one CLEC versus another might make of a particular interconnection agreement, but rather the higher unit cost of interconnecting with a CLEC that seeks to adopt the incumbent's agreement with another CLEC. GNAPs believes that BA-VA's unit cost of interconnectiong with GNAPs would not differ materially from its cost of interconnecting with MFS.

GNAPs also asserts that even if the Commission finds the MFS Agreement is now not available to it for opting-in, GNAPs should be able to opt-in to that agreement under the "old regime" as it existed prior to the Iowa Utilities Board decision, because to hold otherwise would reward BA-VA for its delay and prolonged refusal to GNAPs' request to opt into the MFS Agreement.

After the parties filed their supplemental briefs, the FCC issued its order on reciprocal compensation.[3] By order dated March 11, 1999, we scheduled oral argument so the parties could address what effect, if any, the FCC's order and the Iowa

[3] In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68 (Feb. 26, 1999).

Utilities Board decision have on this case. Oral argument was held March 25, 1999.

The threshold issue is whether GNAPs can opt into the MFS Agreement, which was entered in July 1996. At the hearing, much discussion centered on whether the requirement of FCC Rule 51.809(c) that interconnection agreements be made available to other carriers for a "reasonable period of time" applied to the parties in this instance. Regardless of whether that rule applies here, all parties agreed that the Commission could establish a standard of reasonableness for determining how long an incumbent carrier must make available to others its approved interconnection agreements.

GNAPs first sought to opt into the MFS Agreement in August 1998. By its terms, the MFS Agreement may be terminated July 1, 1999, and anyone adopting this agreement is bound by that term, unless otherwise negotiated. If a reasonable time rule were to apply here, whether under FCC Rule 51.809 or some other standard created by this Commission, we believe that GNAPs' request was made beyond a reasonable time within which BA-VA should be required to permit a carrier to opt into an approved agreement.

As a practical matter, we must also consider the Commission's practices in arbitration proceedings for directing the parties to submit agreements for approval and for reviewing and approving such agreements. If we were to direct BA-VA to offer to GNAPs the

MFS Agreement, there would likely be only thirty days, at most, from the time such an adopted agreement would be approved until BA-VA could terminate the agreement pursuant to the contract terms. Therefore, we find that it is not practical to require such a short contract term in light of the remaining time available under the MFS Agreement, particularly including the time necessary for filing and Commission approval of an agreement. As with the maxim "equity will not do a vain or useless thing," we cannot find it practicable to grant GNAPs even the most limited relief requested. We will not make a determination that does not confer any real benefit or effect any real relief, and which is impracticable to carry out. Accordingly,

IT IS THEREFORE ORDERED THAT:

(1) To the extent GNAP's petition seeks to adopt the MFS Agreement, the relief requested is denied.

(2) This matter is dismissed and the papers filed herein shall be placed in the file for ended causes.